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GREEN PROSPECT SDN BHD v. KING ONG DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HASNAH MOHAMMED HASHIM JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: A-02(NCVC)(W)-1858-09-2017]
10 JULY 2018

C ***CONTRACT:*** *Building contract – Unwritten contract – Appointment of contractor by land owner to construct factory – Contract based on quotation and purchase order – Land owner appointed quantity surveyor to conduct site re-measurement of works carried out by contractor to ascertain actual amount payable – Contractor disputed value of works in quantity surveyor's reports – Type of contract entered into between land owner and contractor – Features of contract – Determination of contract based* D *on contemporaneous documents – Whether contract entered into between parties was lump sum contract or re-measurement contract*

The appellant ('defendant') appointed the respondent ('plaintiff') as the contractor to construct a factory on his land. The plaintiff gave a quotation of RM49,680,000 and after accepting the same, the defendant issued a E purchase order ('PO'), together with a set of approved building plans. The parties further issued quotations and/or POs for additional items/variation works which were outside the scope of the terms of the PO. The plaintiff also issued credit notes, as well as deductions to the invoices, to the defendant whenever there were overcharges due to discrepancies in the quantities of F work done upon re-measurement. When the plaintiff forwarded letters of delivery of vacant possession in respect of certain items of work to the defendant, the latter refused to take them as defects were discovered. Instead, the defendant requested the defendant to list the incomplete works and defective items. The plaintiff issued a letter of delivery of vacant possession G again. This was partial handing over of the works as the plaintiff was still continuing work on the site. The plaintiff then issued progress claim but the defendant rejected the same on the ground of incomplete works. Before the completion of the works, the defendant appointed a quantity surveyor ('QS') to conduct a site re-measurement of the works carried out by the plaintiff to ascertain the actual amount payable. The QS prepared two reports ('the QS H reports'). The plaintiff disputed the value of the works in the QS reports and commenced a suit, at the High Court, against the defendant for the unpaid amount of RM4,266,490.17. The defendant counterclaimed the sum of RM2,130,640.33 as overpayment made to the plaintiff based on the QS reports. The High Court, in allowing the plaintiff's claim and dismissing the I defendant's counterclaim, concluded that the contract entered between the parties was a lump sum contract and not a re-measurement contract. Hence,

the present appeal. The issue that arose for adjudication was whether the parties agreed to carry out works based on a lump sum or a re-measurement basis.

Held (allowing appeal)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) In a lump sum contract, the contractor undertakes to carry out the specified defined works with approved construction drawings for a fixed sum. The main characteristic of a lump sum contract is that the contractor, generally, isn't required to provide a detailed breakdown of costs and expenses even though there are bills of quantities ('BQ'). A lump sum contract may be used where the contractor is able to provide an accurate estimate of the costs of the project, including the schedule and the scope of the entire project. When a project is well-defined in respect of the scope and schedule of the project and clear at the time of tendering, changes, if any, are unlikely or minimal in a lump sum contract. In such a contract, the contractor, from the commencement of the works, is able to accurately price the risk they are being asked to accept. If there are progress payments made, the contract could not be a lump sum contract. (paras 21 & 24)

(2) In a re-measurement contract, there will be a BQ that is estimated and not final. In practice, the contractor will quote against each BQ item and enter a unit rate or unit price to build up the total contract price on basis of those BQ. The actual contract sum in a re-measurement contract could not be determined when the contract is entered into, but calculated upon completion, based on 're-measurement' of the actual work carried out and the rates tendered. During the construction period, the actual quantity of works executed under each BQ item would be jointly measured and valued at the quoted rate for interim payment purpose. Upon the completion of the contract, the exact quantity of works finally executed under each BQ item would be again re-measured. (para 25)

(3) Even though the PO had stated the quantity as '1LS', nevertheless both the quotation and the PO expressly stated 'Suggestion for item 1-23 any different amount on the job, will be re- measured again …'. There were additional works involved. For the works as per the PO and additional works, the plaintiff charged the defendant based on the actual work done even though the words 'LS' or 'lump sum' were stated. Based on the documents issued by the plaintiff, the parties had in fact re-measured the works done. Progress payments were also made to the plaintiff and this was not disputed. The defendant's witness was the person who prepared the PO and had explained, in his witness statement, that the quotation was an estimate provided by the plaintiff based on rough plans drawn.

It identified the items, quantities, rates and estimated value of works. The PO was issued on estimation of the quantities of work and the parties had agreed that a final re-measurement of the quantities of works should be conducted to ascertain the value of works done. (paras 32 & 34)

(4) Since the defendant's QS had physically inspected the works, the QS and the QS report must be considered reliable and credible. From the very beginning, the parties had agreed to a re-measurement contract. Therefore, the works completed must be measured before any payments were made. Based on both oral and documentary evidence, the contract was clearly not a lump sum contract, in view of the provision for progress payments. (paras 36 & 37)

(5) The quotation and the PO formed the foundation of the contractual relationship between the plaintiff and the defendant. The presence of the words 'P/s: Suggestion for item 1-23 any different amount on the job, will be re-measured again', in both documents, cemented the re-measurement arrangement agreed to by the parties. The contract was clearly not a lump sum contract in view of the progress payments made, and the written statements found in the quotation, POs and other documents confirmed by the defendant's QS. The High Court erred in failing to consider that (i) the contemporaneous evidence and the surrounding circumstances as well as totally disregarding the QS report; and (ii) the parties had, throughout the duration of the contract, regarded the contract to be on re-measurement basis. Furthermore, the plaintiff failed to adduce evidence to challenge or rebut the re-measurement findings by the defendant's QS. (paras 40 & 41)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') melantik responden ('plaintif') sebagai kontraktor untuk membina sebuah kilang di atas tanahnya. Plaintif memberi sebut harga berjumlah RM49,680,000 dan selepas menerimanya, defendan mengeluarkan pesanan belian ('PB'), bersama-sama satu set pelan bangunan yang diluluskan. Pihak-pihak selanjutnya mengeluarkan sebut harga dan/atau PB untuk item-item tambahan/kerja-kerja pelbagai luar skop terma-terma PB. Plaintif juga mengeluarkan nota kredit, dan juga penolakan invois, kepada defendan apabila terdapat lebihan caj susulan kepincangan dalam kuantiti kerja-kerja yang dijalankan selepas ukuran semula. Apabila plaintif mengirim surat-surat penyerahan milikan kosong, berkaitan beberapa kerja kepada defendan, defendan enggan mengambilnya kerana menjumpai beberapa kecacatan. Sebaliknya, defendan memohon agar defendan menyenaraikan kerja-kerja yang tidak sempurna dan item-item cacat. Plaintif, sekali lagi, mengeluarkan surat penyerahan milikan kosong. Ini adalah sebahagian penyerahan kerja-kerja kerana plaintif masih terus bekerja di tapak tersebut. Plaintif kemudian mengeluarkan tuntutan kemajuan tetapi defendan menolaknya atas alasan kerja-kerja tidak sempurna. Sebelum kerja-kerja sempurna, defendan melantik seorang juruukur bahan ('JB') untuk

menjalankan ukuran semula kerja-kerja di tapak, yang dijalankan oleh plaintif, demi menentukan jumlah sebenar yang perlu dibayar. Juruukur bahan menyediakan dua laporan ('laporan-laporan JB'). Plaintif mempertikai nilai kerja-kerja dalam laporan-laporan JB dan memulakan satu guaman, di Mahkamah Tinggi, terhadap defendan untuk jumlah RM4,266,490.17 yang tidak berbayar. Defendan menuntut balas jumlah RM2,130,640.33 iaitu lebihan bayaran yang dibayar kepada plaintif berdasarkan laporan-laporan JB. Mahkamah Tinggi, dalam membenarkan tuntutan plaintif dan menolak tuntutan balas defendan, memutuskan kontrak yang dimeterai antara pihak-pihak adalah kontrak sekali gus dan bukan kontrak ukuran semula. Maka timbul rayuan ini. Isu yang berbangkit untuk diputuskan ialah sama ada pihak-pihak bersetuju menjalankan kerja-kerja atas dasar sekali gus atau ukuran semula.

Diputuskan (membenarkan rayuan)
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Dalam kontrak sekali gus, kontraktor berjanji untuk menjalankan kerja-kerja khusus yang digariskan serta lukisan-lukisan pembangunan yang diluluskan untuk satu jumlah tetap. Ciri utama kontrak sekali gus ialah kontraktor, amnya, tidak perlu menyediakan huraian terperinci kos dan perbelanjaan walaupun terdapat jadual bahan ('BQ'). Satu kontrak sekali gus boleh diguna apabila kontraktor boleh menyediakan satu anggaran tepat kos projek, termasuk jadual dan skop keseluruhan projek. Apabila satu-satu projek menggariskan, dengan tepat, skop dan jadual projek dan adalah jelas semasa mengemukakannya, pertukaran, jika ada, berkemungkinan tiada atau minima dalam kontrak sekali gus. Dalam kontrak sedemikian, kontraktor, bermula dari pemulaan kerja-kerja, boleh, dengan tepat meletakkan harga pada risiko yang mereka diminta terima. Jika tuntutan kemajuan dibuat, kontrak tersebut tidak boleh menjadi kontrak sekali gus.

(2) Dalam kontrak ukuran semula, terdapat BQ yang dianggarkan dan tidak muktamad. Secara amalannya, kontraktor akan menyebut harga setiap item BQ dan memasukkan unit kadar atau unit harga untuk mendapatkan jumlah harga kontrak atas alasan BQ tersebut. Jumlah sebenar kontrak dalam ukuran semula tidak boleh ditentukan apabila kontrak dimeterai tetapi diukur selepas sempurna, berdasarkan ukuran semula kerja-kerja sebenar yang dijalankan dan kadar yang dikemukakan. Semasa tempoh pembangunan, kuantiti kerja-kerja sebenar yang dijalankan bawah setiap item BQ akan diukur bersekali dan dinilai pada kadar yang disebut untuk tujuan bayaran interim. Selepas kontrak sempurna, kuantiti sebenar kerja-kerja akhirnya yang dilaksanakan bawah setiap item akan diukur semula.

(3) Walaupun PB menyatakan kuantiti sebagai '1LS', bagaimanapun kedua-dua sebut harga dan PG jelas menyatakan 'Suggestion for item 1-23 any different amount on the job, will be re-measured again …'. Terdapat

kerja-kerja tambahan yang terlibat. Plaintif mengenakan caj terhadap defendan, untuk kerja-kerja tersebut, seperti dalam PB dan kerja-kerja tambahan, berdasarkan kerja sebenar yang dijalankan walaupun perkataan-perkataan 'LS' atau 'lump sum' dinyatakan. Berdasarkan dokumen-dokumen yang dinyatakan oleh plaintif, pihak-pihak telah, sebetulnya, mengukur semula kerja-kerja yang dijalankan. Tuntutan kemajuan juga dibuat kepada plaintif dan ini tidak dipertikai. Saksi defendan ialah orang yang menyediakan PB tersebut dan dia telah menjelaskan, dalam pernyataan saksinya, bahawa sebut harga tersebut adalah anggaran yang disediakan oleh plaintif berdasarkan pelan kasar yang dilukis. Ini mengenal pasti item-item, kuantiti, kadar dan nilai-nilai kerja yang dianggarkan. Pesanan belian dikeluarkan berdasarkan anggaran kuantiti kerja-kerja yang dijalankan dan pihak-pihak bersetuju bahawa satu ukuran semula, yang muktamad, kuantiti kerja-kerja harus dijalankan untuk menentukan nilai kerja-kerja yang disempurnakan.

(4) Oleh kerana JB defendan telah menjalankan pemeriksaan fizikal terhadap kerja-kerja, JB dan laporan JB mesti dianggap boleh dijadikan sandaran dan boleh dipercayai. Sejak awal lagi, pihak-pihak telah bersetuju dengan kontrak ukuran semula. Oleh itu, kerja-kerja yang dijalankan mesti diukur sebelum apa-apa bayaran dibuat. Berdasarkan keterangan lisan dan dokumentar, kontrak tersebut jelas bukan kontrak sekali gus melihat pada peruntukan tentang bayaran-bayaran kemajuan.

(5) Sebut harga dan PB membentuk asas hubungan kontraktual antara plaintif dan defendan. Kewujudan perkataan-perkataan 'P/s: Suggestion for item 1-23 any different amount on the job, will be re-measured again' dalam kedua-dua dokumen, memperkukuhkan aturan ukuran semula yang disetujui oleh pihak-pihak. Kontrak tersebut jelas bukan satu kontrak sekali gus melihat pada bayaran kemajuan yang dibuat, dan pernyataan-pernyataan bertulis yang ditemui dalam sebut harga, PB dan dokumen-dokumen lain yang disahkan oleh JB defendan. Mahkamah Tinggi terkhilaf kerana gagal mempertimbangkan (i) keterangan semasa dan hal-hal keadaan sedia ada dan mengabaikan laporan JB; dan (ii) pihak-pihak telah, sepanjang tempoh kontrak, menganggap kontrak atas dasar ukuran semula. Tambahan lagi, plaintif gagal mengemukakan keterangan demi mencabar atau menyangkal dapatan ukuran semula oleh JB defendan.

Case(s) referred to:

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Ming & Co v. Leong Ping Ching [1964] 1 LNS 111 HC ***(refd)***

Tan Hock Chan v. Kho Teck Seng [1979] 1 LNS 110 FC ***(refd)***

Usima Sdn Bhd v. Lee Hor Fong [2017] 9 CLJ 646 FC ***(refd)***

Other source(s) referred to:

Hudson's Building and Engineering Contracts, 12th edn, para 5-027

For the appellant - Gopal Sri Ram, Eddie Chuah, Chong Ker Ling, David Yii & Damien Chan; M/s Wong & Partners

For the respondent - CK Yeoh, Navpreet Singh, Steven Su, CF Lau & Kelvin Ding; M/s KS Su & Mah

[Editor's note: For the High Court judgment, please see King Ong Development Sdn Bhd lwn. Green Prospect Sdn Bhd [2017] 1 LNS 1925 ((overruled).]

Reported by Najib Tamby

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] This is an appeal by the appellant (the defendant in the High Court) against the decision of the High Court dated 21 August 2017 made after a full trial, which allowed the plaintiff's claim for the sum of RM4,266,490.17 together with interest at the rate of 5% per annum on the judgment sum calculated from the date of the writ until the date of full realisation and costs against the defendant. The defendant's counterclaim for overpayment of RM2,120,640.33 based on re-measurement was dismissed.

[2] We heard this appeal on 8 May 2018 and reserved our decision. After perusing the records of appeal, the written submissions filed by the respective learned counsel and upon hearing learned counsel, we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] For ease of reference, in this judgment, the parties will be referred to as the defendant and plaintiff respectively.

The Relevant Facts

[5] The relevant facts in the instant appeal are not complicated. The salient facts can be summarised as follows. The defendant owns three pieces of land located at Lumut Industrial Park, Lumut, Perak ("the said land'). The defendant appointed the plaintiff as the contractor to construct factory comprising of blocks C, D, E and F to manufacture rubber gloves on the said land ("the works").

[6] The plaintiff gave a quotation dated 22 February 2013 of RM49,680,000 which was accepted by the defendant ("the quotation"). Upon the acceptance of the quotation, the defendant subsequently issued purchase order no. 14-00547 dated 15 May 2013 together with a set of building plans approved by the Majlis Perbandaran Manjung ("the PO"). The parties also issued further quotations and/or purchase orders for additional items/variation works which were outside the scope of the terms said PO. The expected completion date was August 2014.

[7] The plaintiff also issued credit notes as well as deductions to the invoices to the defendant whenever there were overcharges due to discrepancies in the quantities of work done upon re-measurement. Sometime in August 2014 the raw water treatment collapsed which resulted in the delay of the intended startup date for production.

[8] The plaintiff *vide* email dated 21 August 2014 forwarded letters of delivery of vacant possession dated 20 August 2014 in respect of certain items of work to the defendant. However, the defendant refused to take delivery of vacant possession as defects were discovered and requested the plaintiff to list the incomplete works as well as defective items. The plaintiff issued a letter of delivery of vacant possession again dated 3 October 2014. This was in fact partial handing over of the works as the plaintiff was still continuing work on the site. The plaintiff issued progress claim no.10 dated 19 January 2015. The defendant rejected the aforesaid progress claim as there were still uncompleted works. The works pursuant to the PO was finally completed sometime in June 2015.

[9] The facts above which included the claim for additional works are not in dispute. The main issue and figures in dispute between the plaintiff and the defendant can be summarised as follows:

Description	Defendant's Position	Plaintiff's Position
Over-invoiced value	RM4,363,296.00	Lump Sum
Non compliance	RM1,387,012.20	Practical Completion
Omission	RM2,378,332.10	RM1,731,509.80
TOTAL	RM8,128,640.30	RM1,731,509.80
Plaintiff's Claim		RM4,266,490.17
Defendant's Claim	RM2,120,640.33	

[10] Sometime in January 2015, the defendant appointed a quantity surveyor (QS) to conduct a site re-measurement of the works carried out by the plaintiff to ascertain the actual amount payable. The QS prepared two reports as follows:

a) A report dated August 2015; and

b) Supplementary report dated February 2017

("the QS reports").

[11] The plaintiff was given a copy of the report dated August 2015 to review and to analyse the said report. The plaintiff, however disputed the value of works as a result of the re-measurement by the QS and issued a demand letter to the defendant. The plaintiff then proceeded to commence the suit against the defendant for amounts unpaid in the sum of RM4,266,490.17.

[12] The defendant counterclaimed the sum of RM2,130,640.33 as overpayment made to the plaintiff based on the QS's reports.

The High Court's Findings

[13] Two issues were identified by the learned judge as follows:

(i) the nature of the contract between the parties; and

(ii) the scope of specification of the contract on the execution of contractual work by the defendant and the payment.

[14] The High Court, after a full trial and having analysed the evidence sustained the claim of the plaintiff. In the grounds of judgment, the learned judge gave his reasons why he found the plaintiff's case proved on a balance of probabilities. After considering the evidence, the learned judge concluded that the contract entered between the parties is a lump sum contract and not a re-measurement contract. Since it is a lump sum contract, the learned judge dismissed the counterclaim by the defendant.

Our Analysis And Decision

[15] Learned counsel for the defendant submitted that the learned judge had fundamentally erred when he determined that the contract is a lump sum contract as the contemporaneous evidence show that the parties had acted on a re-measurement basis. There were overwhelming contemporary documents such as the purchase orders, the quotation, invoices and credit notes issued which showed that the parties had acted on a re-measurement basis and the final amount payable was to be determined based on the re-measurement of the actual work done.

[16] The trial judge accepted and relied on the oral evidence of one witness Koh Boh Soon (SP1) as well as a purchase order issued by a non-party to the suit to conclude that it is a lump sum contract despite accepting the evidence that there was re-measurement term. It was further argued by learned counsel for the defendant that having ruled that it is a lump sum contract, the learned High Court Judge disregarded all the other evidence before him in particular the evidence of the QS on the actual work done.

[17] The plaintiff failed to adduce any rebuttal evidence to challenge the re-measurement findings made by the QS but instead engaged a QS to re-measure the works done based on drawings before the trial commenced. It was however, not disputed that the plaintiff's QS did not conduct a physical re-measurement of the works.

[18] The thrust of the defendant's appeal is that the learned judge erred in fact and law in holding that the contract executed is based on a lump sum basis. His Lordship failed to consider that based on the expert evidence, there was evidence of actual re-measurement of the factory blocks contracted and thus there was in fact an overpayment to the plaintiff by the defendant.

[19] In our view, the central issue in this appeal relates to the following question. That is, whether the parties had agreed to carry out the works based on a lump sum or a re-measurement basis. The parties did not execute a formal written contract, but relied on the terms of the quotation, the PO as well as other documents such as POs, invoices and credit notes issued and the expert reports to support their respective claims.

Lump Sum Contract And Re-Measurement Contract

[20] In our judgment, before we examine the learned High Court Judge's reasons for his decision, we feel that it would be useful to look at the two types of construction contracts and the distinctive features of the said contracts.

Lump Sum Contract

[21] In a lump sum contract, the contractor undertakes to carry out the specified defined works with approved construction drawings for a fixed sum. The main characteristic of a lump sum contract is that the contractor generally is not required to provide a detailed breakdown of costs and expenses even though there is a bills of quantities (BQ). A lump sum contract may be used where the contractor is able to provide an accurate estimate of the costs of the project, including the schedule and the scope of the entire project. When a project is well defined in respect of the scope and schedule of the project and clear at the time of tendering, changes, if any, are unlikely or minimal in a lump sum contract. In such a contract, the contractor from the commencement of the works is able to accurately price the risk they are being asked to accept.

[22] The Federal Court in *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273; [2015] MLJU 577 explained that under a lump sum contract:

> … price is agreed upon by parties before the works begin. In a lump sum construction contract it is a single whole construction contract as opposed to a divisible contract. *The Major Law Lexicon* (by P Ramanatha Aiyar) 4th Edition Volume 4 defines a lump sum contract as a type of contract under which the contractor agrees to undertake and complete constructional works for a given price, and if costs exceed price, the loss is borne out by the contractor. If the extra work carried out is with the principal's approval (subject to any extra conditions) that extra cost may be recoverable. (*Sharpe v. San Paolo Railway Company)* (1873) LR Ch App 597; *Coker v. Young (1860) 2 F & F 98).*
>
> [51] When discussing the issue of extra payments, *Keating on Construction Contracts* (9th Edition) at page 105 wrote:
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> A lump-sum contract is a contract to complete a whole work for a lump sum e.g. to build a house for £60,000. If the house is completed in every detail required by the contract the contractor is entitled to £60,000. And if extra work was carried out it may be able to recover further payment.

[23] In the case of *Ming & Co. v. Leong Ping Ching* [1964] 1 LNS 111; [1964] 1 MLJ 312 the claim was on the basis of *quantum meruit* for the value of work done by the plaintiffs for the defendant in relation to a contract for the erection of certain additional floors to the back portion of premises. There was no formal written contract between the parties, apart from letters which the parties wrote to each other in connection with the construction work. The issue of whether the contract was a lump sum contract or otherwise was argued. Gill J scrutinised the contemporaneous evidence and concluded:

> The main defence to the claim is that this was a lump sum or an entire contract which was abandoned after a part of the work had been done and that consequently on the authority of *Sumpter v. Hedges* [1898] 1 QB 673 the plaintiffs have no right to sue on *quantum meruit*. The answer to that is that in the first place the plaintiffs did not abandon the work, and, in the second place, this was not an entire contract. An entire contract is one in which the entire completion of the work by the contractor is a condition precedent to payment. To my mind, a contract in respect of which progress payments are made from time to time is not an entire or lump sum contract. The payments which were made in this case have been referred to as advance payments, but there is evidence that they bore relation to the work done. The doctrine of *Sumpter v. Hedges* therefore, in my opinion, has no application to this case.

[24] Therefore, if there are progress payments made, the contract cannot be a lump sum contract.

Re-Measurement

[25] In a re-measurement contract, there will be a BQ, that is estimated and not final. In practice, the contractor will quote against each BQ item and enter a unit rate or unit price to build up the total contract price on basis of those BQ. The actual contract sum in re-measurement contract cannot be determined when the contract is entered into, but calculated upon completion, based on 're-measurement' of the actual work carried out and the rates tendered. During the construction period, the actual quantity of works executed under each BQ item will be jointly measured and valued at the quoted rate for interim payment purpose. Upon the completion of the contract, the exact quantity of works finally executed under each BQ item will be again re-measured.

[26] The Federal Court in its judgment in the case of *Usima Sdn Bhd v. Lee Hor Fong* [2017] 9 CLJ 646; [2017] MLJU 1306 referred to the learned author of GT Gajira's *Law Relating to Building and Engineering Contracts in India* describing re-measurement as "more often than not only means re-calculation, and physical measurements or dimension taken on site only occur in relation to work not of its nature subject to calculations of drawings."

[27] In *Hudson's Building and Engineering Contracts,* 12th edn at para. 5-027 it states that:

> The difference between a lump sum contract and a measured contract in this situation lies in the fact that, in the former case, both parties carry the risk of these types' differences and the price will not alter, whereas in the latter the contract sum will be adjusted, up or down, to take account of the differences.

The Evidence

[28] In order to determine whether the agreement between the parties in this instant appeal is based on lump sum or re-measurement, the documentary and oral evidence must be carefully examined. The learned judge arrived at his findings that the contract is a lump sum contract based on the following:

(a) The PO had repeatedly described the same scope of works and price in the quotation thus the defendant must have agreed to the plaintiff's offer of scope of works specified at the fixed price;

(b) In the PO under the column for "quantity" the words stated were "1LS";

(c) The POs issued by YTY Industry Sdn Bhd contained the word "1L/sum";

(d) Accepting the testimony of SP1;

(e) Re-measurement in the postscript refers to any different amount on the job;

(f) The defendant had paid the progress claims without objecting or disputing the works;

(g) The defendant only appointed the QS to re-measure after the handover in August 2014.

The Quotation

[29] The quotation dated 22 February 2013 for the project detailed the works to be carried out was submitted by the plaintiff. It is expressly stated in the said quotation that for items 1-23 "… any different amount on the job, will be re-measured." The defendant subsequently issued a PO dated 15 May 2013 accepting the quotation and expressly reiterating that "P/s: Suggestion for item 1-23 any different amount on the job, will be re-measured again."

[30] Items 1 to 23 in the quotation are extensively set out as follows:

KING ONG DEVELOPMENT SDN BHD

1. BLOCK D

a) Packing Area: 203' x 140' x 3½ Storey @ RM65.00/sq.ft. — RM 6,465,550.00

– Work Include: Ceiling, Floor Tiles, Aluminium Window, Timber & Fire Door, Painting Work (Surface with the Weather shield Only).

– Work Exclude: Piling Work, Piping Work & Wiring Work.

b) Waterproofing Work – for Roof Top Only : 203' X 140' @ RM7.00/sq.ft. — RM 198,940.00

c) Glove Dipping Lines: 100' x 380' @ RM56.50/sq.ft. — RM 2,147,000.00

– Work Include: I-Beam Roofing, Timber Door, Painting Work (Surface with the weather shield Only).

– Work Exclude: Piling Work, Piping Work & Wiring Work, Marble.

d) Machine Footing: 4,320 foot run @ RM27.80 — RM 120,096.00

e) Machine Footing Side Drain: 4,680 foot run @ RM5.00 — RM 23,400.00

f) Box Culvert 4'': 200 foot run @ RM100.00 — RM 20,000.00

g) Marble: 38,000 sq.ft. @ RM7.00 — RM 266,000.00

h) Scrubber Room: 60' x 100' x 2½ Storey @ RM65.00/sq.ft. — RM 975,000.00

– Work Include: 2 units Staircase.

– Work Exclude: Piling Work, Piping Work & Wiring Work.

i) Waterproofing Work – for Roof Top Only : 60' x 100' x RM7.00/sq.ft. — RM 42,000.00

2. WASHROOM: 33½ x 65' @ RM135.00/sq.ft — RM 285,187.50

– Work Include: Wall Tiles, Floor Tiles, Piping Work & Sanitary, Painting Work (Surface with the weather, shield Only).

– Work Exclude: Piling Work, Wiring Work.

3. MSB ROOM: 40' x 65' @ RM70.00/sq.ft. — RM 182,000.00

– Work Include: Internal Drain, Painting Work, Door & Window.

– Work Exclude: Piling Work, Wiring Work.

A	4. CONCRETE SLA: 20' x 65' @ RM31.00/sq.ft	RM	40,300.00
	5. CHILLER ROOM: 65' x 80' @ RM88.00/sq.ft	RM	457,600.00
	– Work Include: Cooling Stand & 10' x 25' x 10'(Deep) Pond, Painting Work (Surface with the weather shield Only).		
B	– Work Exclude: Piling Work, Piping Work & Wiring Work.		
	a) Waterproofing Work – for Roof Top Only: 65' x 80' x RM7.00	RM	36,400.00
C	6. COMPOUNDING BLOCK: 65' x 160' x 2 Storey @ RM83.00/sq. ft	RM	1,726,400.00
	– Work Include: I – Beam Roof, Ceiling, Aluminium Window, Timber Door, Painting Work (Surface with the weather shield Only)		
D	Production Office: Floor Tiles. LAP: Floor Tiles, Wall Tiles, basin Top. Chemical Store: Floor Tiles, Table Top. Storage Tank: Concrete Slab & 40' (h) I – Beam Roof.		
E	Upstair Office: Door & Window		
	– Work Exclude: Piling Work, Piping Work & Wiring Work.		
	7. CHLORINE ROOM: 45' x 60' @ RM65.00/sq.ft.	RM	175,500.00
F	– Work Include: Painting Work (Surface with the weather Shield Only)		
	– Work Exclude: Piling Work, Piping Work & Wiring Work.		
G	a) Waterproofing Work – for Roof Top Only : 45' x 60' @ RM7.00/sq.ft.	RM	18,900.00
	8. TOH ROOM (Boiler Block): 100' x 60' @ RM73.00/sq.ft.	RM	438,000.00
	– Work Include: Smoke Stand Column, Boiler Pipe Stand, Painting Work (Surface with the weather shield Only), I-Beam Roofing.		
H	– Work Exclude: Piling Work, Piping Work & Wiring Work.	RM	84,000.00
	9. TNB SUB-STATION – 20' x 60' @ RM70.00/sq.ft.		
I	– Work Include: Internal Drain, Door & Window.		
	– Work Exclude: Piling Work & Wiring Work.		

10. WASTE WATER UNDERGROUND TANK : 20' x 40' x 10' (deep) @ RM3.10/gallons		RM	155,000.00
11. 6 NOS WATER TANK FOOTING & I – BEAM STRUCTURE : 40' x 60' x 50' (h)	L/SUM	RM	592,250.00
– Work Include: 3 units Pump House 10' x 27' x 8' (h),			
3 units Underground Water Pond 10' x 30' x 10' (d), Painting Work (Surface with the weather shield Only).			
– Work Exclude: Piling Work, Piping Work, Wiring Work, 6 nos Water Tank.			
12. BLOCK E			
a) Packing Area: [(128' x 140')-(110' x 28')] x 3½ Storey @ RM65.00/sq.ft		RM	3,376,100.00
– Work Include: Ceiling, Floor Tiles, Aluminium Window, Timber & Fire Door, Painting Work (Surface with the weather shield Only).			
– Work Exclude: Piling Work, Piping Work & Wiring Work.			
b) Waterproofing Work – for Roof Top Only [(128 x 140')-(110' x 28')] x RM7.00/sq.ft.		RM	103,880.00
c) Glove Dipping Lines : 100' x 380' @ RM56.50/sq.ft.		RM	2,147,000.00
– Work Include : I-beam Roofing, Timber Door, Painting Work (Surface with the weather shield Only).			
– Work Exclude: Piling Work, Piping Work, Wiring Work, Marble.			
d) Machine Footing : 4,320 foot run @ RM27.80		RM	120,096.00
e) Machine Footing Side Drain : 4,680 foot run @ RM5.00		RM	23,400.00
f) Box Culvert 4": 200 foot run @ RM100.00		RM	20,000.00
g) Marble : 38,000 sq.ft. @ RM7.00		RM	266,000.00
h) Scrubber Room : 60' x 100' x 2½ Storey @ RM65.00/sq.ft.		RM	975,000.00
– Work Include : 2 units Staircase.			
– Work Exclude : Piling Work, Piping Work & Wiring Work.			

i) Waterproofing Work – for Roof Top Only : 60' x 100' x RM7.00/sq.ft.	RM	42,000.00
13. BLOCK F		
a) Main Office : 100' x 140' x 3½ Storey @ RM65.00/sq.ft	RM	3,185,000.00
– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Wash Room, Painting Work (Surface with the weather shield Only)		
– Work Exclude : Piling Work, Piping Work & Wiring Work.		
b) Waterproofing Work – for Roof Top Only : 100' x 140' x RM7.00/sq.ft	RM	98,000.00
c) Main Office & Store : 100' x 150' x 2½ Storey @ RM65.00/sq.ft.	RM	2,437,500.00
– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Wash Room, Painting Work & Staircase.		
– Work Exclude : Piling Work, Piping Work & Wiring Work.		
d) Waterproofing Work – for Roof Top Only: 100' x 150' x RM7.00/sq.ft	RM	105,000.00
14. CANTEEN & STORE : 100' x 260' x 2 Storey @ RM67.00/sq.ft.	RM	3,484,000.00
– Work Include : Floor Tiles, Ceiling, Kitchen Wall Tiles & Floor Tiles, Basin Top, Wash Room, Painting Work (Surface with the weather shield Only), I – Beam Roofing & Staircase.		
– Work Exclude : Piling Work, Piping Work & Wiring Work.		
15. BLOCK C		
a) Finished Goods Store : [(128' x 140') - (110' x 28')] x 3½ Storey @ RM65.00/sq.ft.	RM	3,376,100.00
– Work Include : Floor Tiles, Ceiling, Aluminium Window, Timber & Fire Door, Staircase, Painting Work (Surface with the weather shield Only).		

– Work Exclude : Piling Work, Piping Work & Wiring Work.			A
b) Waterproofing Work – for Roof Top Only : [(128' x 140') - (110' x 28')] x RM7.00/sq.ft.	RM	103,880.00	
c) WIP SATOGARE : 100' x 420' x 2½ @ RM65.00/sq.ft.	RM	6,825.000.00	B
– Work Include : Forklift Loading Bay, 20' x 100' Awning, Staircase, Timber Door & Fire Door, Painting Work (Surface with the weather shield Only).			
– Work Exclude : Piling Work, Piping Work & Wiring Work.			C
d) Waterproofing Work – for Roof Top Only : 100' x 420' x RM7.00/sq.ft.	RM	294,000.00	
16. WASHROOM : 25' x 28' x 2 Storey @ RM 135.00/sq.ft.	RM	189,000.00	D
– Work Include : Wall Tiles, Aluminium Window, PVC Door, Sanitary, Painting Work (Surface with the weather shield Only), Piping Work.			
– Work Exclude : Piling Work, Piping Work & Wiring Work.			E
17. 33 KV S.S.V. TNB SUB-STATION : 97' x 26' x 2½ Storey @ RM70.00/sq.ft.	RM	441,350.00	
– Work Include : Internal Drain, Door & Window, Fencing & Gate.			F
– Work Exclude : Piling Work & Wiring Work.			
18. INTERNAL TNB SUB-STATION : 65' x 40' @ RM70.00/sq.ft.	RM	182,000.00	
– Work Include : Internal Drain, Door & Window, Fencing & Gate.			G
– Work Exclude : Piling Work & Wiring Work.			
19. IWK SPECIFICATION TANK GWS EA1000 L/SUM	RM	515,000.00	
– Work Include : GWS EA1000 Complete Set, M&E Work, Civil & Structural Works.			H
– Work Exclude : 9" Sewer Line & JWK Specification Sewer Manholes.			
20. TEMPORARY CANTEEN & OFFICE : 60' x 200' x 20 (h) @ RM33.00	RM	396,000.00	I

	– Work Include : Kitchen : Wall/Floor Tiles, basin Top, Piping Work.			
	Office : Floor Tiles.			
	Canteen Area : Cement Floor.			
	a) Piling Work : 6" x 6" x 6 Meter (50 point x 3 pile/point)		RM	18,000.00
	21. TEMPORARY TOILET : 3' x 5' x 8 UNITS	L/SUM	RM	52,000.00
	– Work Include : Piping Work, Septic Tank, Wall Tiles, Floor Tiles, Sanitary.			
	– Work Exclude : Piling Work, Wiring Work.			
	22. COMPLETE WORK SITE CLEARING PLUS INSURANCE	L/SUM	RM	160,000.00
	– Work Include : Excavator work for Acid & Chiller Pipe Area Only.			
	23. FENCING, DRAIN WORKS & ROAD WORKS		RM	45,000.00
	a) Type "A" - 2' - x RM225.00/food run			
	– Work Include : Piling Work & Excavator Work			
	c) Type "A" - 651' - x RM175.00/food run		RM	113,925.00
	– Work Include : Excavator Work			
	– Work Exclude : Piling Work			
	d) Type "B" - 552' - x RM160.00/food run		RM	88,320.00
	– Work Include : Excavator Work			
	e) TYPE "C" – 3285' X RM385.00/feet run		RM	1,264,725.00
	– Work Include : Excavator Work			
	f) TYPE "D"- 3103' x RM390.00/foot run		RM	1,210,170.00
	– Work Include : Excavator Work			
	g) 4' U-DRAIN – 2612' x RM192.00/foot run		RM	501,504.00
	h) 2' U-DRAIN – 5261' x RM42.00/foot run		RM	220,962.00
	i) 3' PIPE CULVERT – 1157' x RM67.00/foot run		RM	77,519.00
	j) 18" PIPE CULVERT – 2457' x RM22.00/foot run		RM	54,054.00
	k) CONCRETE ROAD : 294,791' sq.ft. (as per attachment) X RM7.70/sq.ft		RM	2,269,890.70

l) PREMIX ROAD : (1162' x 60')
= 69,720' sq.ft. x RM6.50/sq.ft. RM 453,180.00

– Work Include : 300 mm C/Run, 4" Premix

– Work Exclude : Piling Work

TOTAL PROJECT AMOUNT: RM49,684,079.20

[31] The defendant subsequently responded to the said quotation by issuing the PO. In the PO, the items 1 to 23 are described as follows:

GREEN PROSPECT SDN BHD

Item	Description	ETA Quantity	Disc %	Unit Price	Amount (RM)
1	30000506 – 1. BLOCK D – a) Packing Area: 203'x140'x3½ storey @ RM65.00/ sq.ft.	1 LS	0.00	6,465,550.00	6,465,550.00
2	30000506 – b) Waterproofing Work – for Roof Top Only 203'x 40' @ RM7.00/sq.ft.	1 LS	0.00	198,940.00	198,940.00
3	3000506 – c) Glove Dipping Lines: 100' x 380' @ RM56.50/ sq.ft.	1 LS	0.00	2,147,000.00	2,147,000.00
4	30000506 – d) Machine Footing: 4,320 foot run @ RM27.80	1 LS	0.00	120,096.00	120,096.00
5	30000506 – e) Machine Footing Side Drain: 4,680 foot run @ RM5.00	1 LS	0.00	23,400.00	23,400.00
6	30000506 – f) Box Culvert 4'': 200 foot run @ RM100.00	1 LS	0.00	20,000.00	20,000.00

A	7	30000506 – g) Marble: 38,000 sq.ft. @ RM7.00	1 LS	0.00	266,000.00	266,000.00
B	8	30000506 – h) Scrubber Room : 60' x 100' x 2½ Storey @ RM65.00/ sq.ft.	1 LS	0.00	975,000.00	975,000.00
C	9	30000506 – i) Waterproofing Work – for Roof Top only 60' x 100' x RM7.00/sq.ft	1 LS	0.00	42,000.00	42,000.00
D	10	30000506 – 2. WASH ROOM: 33½ x 65 @ RM135/ sq.ft	1 LS	0.00	285,187.50	285,187.50
E	11	30000506 – 3. MSB ROOM: 40' x 65' @ RM70/ sq.ft.	1 LS	0.00	182,000.00	182,000.00
F	12	30000506 – 4. CONCRETE SLAB: 20' x 65' @ RM31.00/ sq.ft.	1 LS	0.00	40,300.00	40,300.00
G	13	30000506 – 5. CHILLER ROOM: 65' x 80' @ RM88/sq.ft.	1 LS	0.00	457,600.00	457,600.00
H	14	30000506 – a) Waterproofing Work for Roof Top Only: 65' x 80' x RM7.00	1 LS	0.00	36,400.00	36,400.00
I	15	30000506 – 6. COMPOUNDING BLOCK: 65' x 160' x 2 Storey @ RM83/ sq.ft.	1 LS	0.00	1,726,400.00	1,726,400.00

16	30000506 – 7. CHOLINE ROOM: 45' x 60' @ RM65.00/ sq.ft.	1 LS	0.00	175,500.00	175,500.00	A
17	30000506 – a) Waterproofing Work for Roof Top Only 45' x 60' @ RM7.00/sq.ft.	1 LS	0.00	18,900.00	18,900.00	B
18	30000506 – 8. TOH ROOM (Boiler Block): 100' x 60' @ RM73.00/ sq.ft.	1 LS	0.00	438,000.00	438,000.00	C
19	30000506 – 9. TNB SUB-STATION – 20' x 60' @ RM70.00/ sq.ft.	1 LS	0.00	84,000.00	84,000.00	D
20	30000506 – 10. WASTE WATER UNDERGROUND TANK 20' x 40' x 10' (deep) @ RM3.10/ gallons	1 LS	0.00	155,000.00	155,000.00	E
21	30000506 – 11. 6 NOS WATER TANK FOOTING & I – BEAM STRUCTURE 40' x 60' x 50' (h)	1 LS	0.00	592,250.00	592,250.00	F
22	30000506 – 12. PACKING AREA: (128' x 140')- (110' x 28') x 3½ Storey @ RM65.00/ sq.ft	1 LS	0.00	3,376,100.00	3,376,100.00	G

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23	30000506 – b) Waterproofing Work – for Roof Top Only (128 x 140')-(110' x 28') x RM7/sq.ft	1 LS	0.00	103,880.00	103,880.00

[32] Even though the PO had stated the quantity as "1LS" nevertheless both the quotation and the PO expressly stated the following:

> Suggestion for item 1-23 any different amount on the job, will be re-measured again.

[33] There were additional works involved. For the works as per the PO and additional works, the plaintiff charged the defendant based on the actual work done even though the words "LS" or "lump sum" were stated. Based on the documents issued by the plaintiff adduced as evidence, the parties had in fact re-measured the works done. Progress payments were also made to the plaintiff and this was not disputed.

[34] The defendant's witness (SD1) was the person who prepared the PO and had explained in his witness statement that the quotation was an estimate provided by the plaintiff based on rough plans drawn. It identified the items, quantities, rates and estimated value of works. The PO was issued on estimation of the quantities of work and the parties had agreed that a final re-measurement of the quantities of work should be conducted to ascertain the value of work done. The PO issued by YTY Industry Sdn Bhd should not have been considered as there was no evidence that the works in the said purchase order for a different factory were similar to the works under this appeal.

The QS Reports

[35] Before the commencement of this suit, the defendant had appointed a QS to calculate the works done and completed to ascertain the amount due to the plaintiff. The defendant's QS conducted the re-measurement of the works and concluded that the plaintiff had been overpaid for works done.

[36] The report of the QS dated September 2016 stated that the works were on a re-measurement basis. The plaintiff had also appointed a QS. However, the plaintiff's QS did not conduct a physical re-measurement. Thus, we are of the view that since the defendant's QS had physical inspected the works, the said QS and his report must be considered reliable and credible.

[37] In our judgment, what was a contemplated was that from the very beginning, the parties had agreed to a re-measurement contract. Therefore, the works completed must be measured before any payments are made. Based on both oral and documentary evidence, the contract is clearly not a lump sum contract, in view of the provision for progress payments. (*Re: Ming & Co v. Leong Ping Ching* (*supra*)).

[38] In *Tan Hock Chan v. Kho Teck Seng* [1979] 1 LNS 110; [1980] 1 MLJ 308 the respondent (the contractor) was at all relevant times the building contractor employed by the appellant (the developer) to build six units of three-storeyed shophouses at an agreed cost of $223,000. The agreement between the parties was in writing. It was clear from the terms that the intention of the parties to the agreement was the construction of the project as a whole. The shop houses were not meant to be built one by one. The site was to be prepared in one operation and after its preparation, the piling work was to be commenced for all six houses. The construction was then to proceed by continuous work and the houses were expected to be constructed and ready for occupation at the same time. The payment for the construction by the usual process of progress payments was made dependent upon the completion of the several stages of the entire construction as set out in the particular clause relating to the progress payments.

[39] Chang Min Tat FJ delivering the judgment of the Federal Court said:

> This contract is clearly not a lump sum contract, in view of the provision for progress payments: *Ming & Co v. Leong Ping Ching* [1964] MLJ 312. The contractor had however claimed under a lump sum or entire contract. This on a proper construction of the contract must be regretted. However, the defence had not relied on any contention that a claim under a lump sum contract was not maintainable. The case was fought out on the basis of a claim for *quantum meruit* on a contract which was not for a lump sum. The claim therefore for work done and for the cost of extras must succeed. But on a *quantum meruit*, the claim which was allowed for loss of profits cannot succeed and to this extent the appeal is allowed.

[40] We are of the view that the quotation and the PO formed the foundation of the contractual relationship between the plaintiff and the defendant. The presence of the words "P/s: Suggestion for item 1-23 any different amount on the job, will be re-measured again." in both the documents cemented the re-measurement arrangement agreed to by the parties. The contract is clearly not a lump sum contract in view of the progress payments made as well the written statements found in the quotation, POs and other documents confirmed by the defendant's QS.

[41] In the circumstances, we find that the learned judge had fundamentally erred when he failed to consider the contemporaneous evidence and the surrounding circumstances as well as totally disregarding the defendant's QS report. The learned judge erred when he failed to consider that the parties had throughout the duration of the contract regarded the contract to be on re-measurement basis. Furthermore, the plaintiff failed to adduce evidence to challenge or rebut the re-measurement findings by the defendant's QS.

A

Conclusion

[42] Had the learned High Court Judge considered the evidence in their proper perspective, he could not have come to the conclusion that the contract is a lump sum contract.

B

[43] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[44] For the foregoing reasons, we unanimously allowed the appeal with costs. We set aside the High Court judgment. As for costs, we awarded a sum

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of RM60,000 here and below to the appellant to be paid by the respondent. We also ordered that the deposit be refunded to the appellant.

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